

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-6103

To be argued by
NATHANIEL L. GERBER

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-6103

JACK SILVERSTEIN,

Plaintiff-Appellant,

—v.—

THE UNITED STATES OF AMERICA, COMMISSIONER OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA, DISTRICT DIRECTOR OF INTERNAL REVENUE SERVICE, NEW YORK DISTRICT,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLEES' BRIEF

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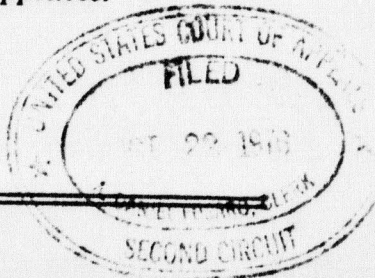


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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-6103

JACK SILVERSTEIN,
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—v.—

THE UNITED STATES OF AMERICA, COMMISSIONER OF IN-
TERNAL REVENUE OF THE UNITED STATES OF AMERICA,
DISTRICT DIRECTOR OF INTERNAL REVENUE SERVICE,
NEW YORK DISTRICT,
Defendants-Appellees.

DEFENDANTS-APPELLEES' BRIEF

Preliminary Statement

Plaintiff-Appellant Jack Silverstein appeals from a judgment of the United States District Court for the Southern District of New York entered May 12, 1976, dismissing the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. That judgment was predicated upon an opinion filed May 10, 1976, wherein the District Court held that it lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief can be granted.

Issues Presented

1. Whether the District Court correctly dismissed the complaint for lack of subject matter jurisdiction.

2. Whether the District Court correctly dismissed the complaint for failure to state a claim upon which relief can be granted.

Statutes and Regulations

The statutory provision which authorizes payment of a reward to an informant is Section 7623 of the Internal Revenue Code of 1954, as amended (the "Code"), 26 U.S.C. § 7623, which provides as follows:

"The Secretary or his delegate, under regulations prescribed by the Secretary or his delegate, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided by law."

Treasury Regulation § 301.7623-1, 26 C.F.R. § 301.7623-1, promulgated thereunder reads in pertinent part:

(a) *In general.* A district director may approve such reward as he deems suitable for information that leads to the detection and punishment of any person guilty of violating any internal revenue law, or conniving at the same. The rewards provided for by section 7623 are limited in their aggregate to the sum appropriated therefor and shall be paid only in cases not otherwise provided for by law.

* * * * *

(c) *Amount and payment of reward.* All relevant factors, including the value of the information furnished in relation to the facts developed

by the investigation of the violation, shall be taken into account by a district director in determining whether a reward shall be paid, and, if so, the amount thereof. The amount of a reward shall represent what the district director deems to be adequate compensation in the particular case, normally not to exceed ten percent of the additional taxes, penalties, and fines which are recovered as a result of the information. . . . No person is authorized under these regulations to make any offer, or promise, or otherwise to bind a district director with respect to the payment of any reward or the amount thereof.

The Tucker Act, 28 U.S.C. § 1346(a)(2), contains the Government's exclusive consent to be sued in any civil action for monetary relief founded, *inter alia*, upon any statute or administrative regulation or upon any express or implied contract with the United States. It reads in pertinent part as follows:

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, contains the Government's exclusive consent to be sued in any civil action for monetary relief sounding in tort. Its scope is limited by the provisions of 28 U.S.C. § 2680(a), which provides that the Federal Tort Claims Act shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* provides for judicial review of administrative action. Its scope is limited by 5 U.S.C. § 701(a), which provides as follows:

(a) This chapter applies, according to the provisions thereof, except to the extent that—

- (1) statutes preclude judicial review; or
- (2) agency action is committed to agency discretion by law.

Statement of the Case

This action was commenced on December 10, 1975 with the filing of a complaint. Plaintiff Jack Silverstein sought to recover a reward from the United States Internal Revenue Service ("IRS") for supplying information which allegedly led to the Government's collection of additional taxes in the amount of one million dollars (\$1,000,000) from various individuals identified in the complaint.*

* Appellant's claim for an informant's reward is the third such case against the Government in the Southern District of New York within the past two years. The others are *Divonne v. Internal Revenue Service*, 75-2 USTC ¶ 9619 (S.D.N.Y. July 16, 1975); *Schein v. United States*, 75 Civ. 3961 (S.D.N.Y. September

[Footnote continued on following page]

Plaintiff concedes that he has already received a reward of seventeen thousand dollars (\$17,000), but contends that based upon assurances given by unidentified IRS personnel, upon which he relied in furnishing information, he is entitled to a total reward in the amount of ten per cent (10%) of the additional taxes recovered, i.e. one hundred thousand dollars (\$100,000) (App. 3a-6a).*

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY FOUND THAT IT LACKED SUBJECT MATTER JURISDICTION.

In his complaint, appellant predicated jurisdiction upon 28 U.S.C. § 1346. Although appellant failed to specify upon which subsection thereof he was relying, the District Court correctly found that neither subsection (a)(2), the Tucker Act, nor subsection (b), the Federal Tort Claims Act, is a cognizable jurisdictional basis for the

9, 1975), *aff'd per curiam*, C.A. No. 75-7552 (2d Cir. February 11, 1976). In addition, prior to his action in the Southern District, the plaintiff in *Schein* had brought a similar action in the United States District Court for the Eastern District of New York where the complaint was dismissed by Judge Neaher. *Schein v. United States*, 352 F. Supp. 182 (E.D.N.Y. 1972). As to the *Schein* case in the Southern District, Judge Duffy dismissed the complaint which predicated jurisdiction upon the Federal Tort Claims Act, 28 U.S.C. § 1346(b). Judge Duffy's decision was affirmed by this Court in a summary order on the grounds that the District Court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief can be granted. In light of § 0.23 of the Rules of the United States Court of Appeals for the Second Circuit, we do not offer this Court's affirmation of *Schein* as authority on this appeal. We do wish to point out, however, the recurring nature of the issues raised on this appeal.

*"App.—" refers to the appendix which appellant filed as part of his brief on this appeal.

claim asserted. The District Court also found that jurisdiction is similarly lacking under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, upon which appellant relies for the first time in his brief to this Court.

The United States may not be sued without its consent, and a party seeking to avail himself of a consent to suit must comply strictly with the terms of that consent. *United States v. Sherwood*, 312 U.S. 584, 586-587 (1941); *Brown v. General Services Administration*, 507 F.2d 1300 (2d Cir. 1974), *aff'd* 44 U.S.L.W. 4704 (June 1, 1976). The Tucker Act, 28 U.S.C. § 1346(a)(2), contains the Government's exclusive consent to be sued in any civil action for monetary relief founded, upon, *inter alia*, "any express or implied contract with the United States. . . ." The only provision of the Code authorizing payment of rewards to informants in section 7623 which provides that the Secretary of the Treasury or his delegate is authorized to pay such sums *as he may deem necessary*. Pursuant to section 7623, the IRS has adopted Treasury Regulation § 301.7623-1, 26 C.F.R. § 301.7623-1, which authorizes each district director of the IRS to pay such rewards *as he deems suitable*.

Appellant contends that jurisdiction exists to review the decision of the IRS on the ground that an oral contract, within the meaning of 28 U.S.C. § 1346(a)(2), was reached between appellant and unidentified IRS personnel. The answer to that contention is that the authorization granted by section 7623 and the pertinent regulation does not give rise to a contractual right, implied or otherwise, to a reward for information voluntarily furnished in the absence of an expressly authorized promise to pay a definite sum. *Schein v. United States*, 352 F. Supp. 182, 186 (E.D.N.Y. 1972). See *Barker v. Lein*, 366 F.2d 757 (1st Cir. 1966); *Saracena v. United States*, 508 F.2d 1333, 1336 (Ct. Cl. 1975).

The rationale of this rule is that the Secretary or his delegate:

offers to pay no definite sum. He merely offers to pay 'such reward as' he 'may deem suitable: There has been no offer by the . . . [district director] to pay any definite sum and, therefore, there has arisen no contract between the . . . [district director] and the plaintiff.

Gordon v. United States, 36 F. Supp. 639, 640 (Ct. Cl. 1941). Accordingly, as the District Court correctly held, section 1346(a)(2) does not confer jurisdiction to entertain this action. *Schein v. United States*, *supra*, 352 F. Supp. 182; *Divonne v. Internal Revenue Service*, 75-2 U.S.T.C. ¶ 9619 (S.D.N.Y. July 16, 1975).

Similarly, neither the Federal Tort Claims Act, 28 U.S.C. § 1346(b), nor the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, can provide a cognizable jurisdictional basis. As to the Federal Tort Claims Act, section 1346(b) confers jurisdiction over claims against the United States for negligent or wrongful acts or omissions of Government employees. Assuming appellant's claim sounds in tort, he cannot rely upon that section because of the exclusionary language of 28 U.S.C. 2680(a). Section 2680(a) provides that subject matter jurisdiction is not available under 28 U.S.C. 1346(b) where the act or omission in question is discretionary on the part of the Government or its employees, regardless of whether or not the discretion involved be abused. Section 7623 of the Code is plainly permissive in tenor and manifests a Congressional intent to commit agency action with respect to informants rewards to the discretion of the IRS. See *Schein v. United States*, *supra*, 352 F. Supp. 182. Accordingly, to the extent that appellant's claim might be interpreted as sounding in tort, it falls squarely within the exclusionary language of 28 U.S.C. 2680(a)

thereby precluding jurisdiction under 28 U.S.C. 1346(b). See *Divonne v. Internal Revenue Service*, *supra*, 75-2 USTC ¶ 9619.

For the same reason, jurisdiction cannot be predicated upon the Administrative Procedure Act which by its own terms does not apply to acts committed by law to agency discretion. 5 U.S.C. § 701(a)(1). *Schein v. United States*, *supra*, 352 F. Supp. at 186; *Divonne v. Internal Revenue Service*, *supra*, 75-2 USTC ¶ 9619. See *Kletchka v. Driver*, 411 F.2d 436, 442-443 (2d Cir. 1969). In any event, appellant seeks an award of damages and the Administrative Procedure Act does not constitute a waiver of sovereign immunity in suits seeking money damages against the United States. *Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941, 948 (D.C. Cir. 1975), *cert. denied*, 96 S.Ct. 1507 (1976); *International Engineering Co. v. Richardson*, 512 F.2d 573, 580-581 (D.C. Cir. 1975), *cert. denied*, 96 S.Ct. 774 (1976); *Warner v. Cox*, 487 F.2d 1301, 1304-1305 (5th Cir. 1974).*

* Appellant contends that once the District Court found itself to be without subject matter jurisdiction, it should not have disposed of the claim on the merits but rather should have dismissed without prejudice to institution of an action based upon the same claim in the Court of Claims. This contention reflects a misunderstanding of the decision of the District Court as well as of the Tucker Act. The District Court found that because Section 7623 of the Code does not give rise to an action in implied contract, jurisdiction could not be founded upon the Tucker Act which is the sovereign's exclusive consent to suit in actions founded upon statutes or regulations or upon claims of express or implied contracts. Inasmuch as the Tucker Act is not a sufficient jurisdictional basis, the lack of jurisdiction could not be cured by transfer to the Court of Claims. Moreover, since section 7623 does not give rise to a contractual right, implied or otherwise, as the District Court necessarily found in considering the jurisdictional issue, the complaint was also deficient for failure to state a claim. (See Point II, *infra*).

POINT II

THE DISTRICT COURT CORRECTLY FOUND THAT THE COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In his complaint, appellant alleged that he was

advised that in accordance with procedures followed by defendants in such matters he would be compensated by the payment to him of an amount equivalent to ten (10%) percent of the additional tax recovered by defendants by virtue of the information furnished defendants by plaintiff, and the work, efforts, labor and services performed by plaintiff in connection with said matters.

(App. 4a.) Appellant further alleged that he relied upon said representations and continued to furnish information to the IRS. Thus, the basis of his claim is that an implied contract arose and that pursuant to Section 7623 of the Code, the IRS is obligated to pay a reward of ten per cent (10%) of the additional taxes recovered.

As shown above, neither Section 7623 of the Code nor the pertinent regulation constitutes an offer of any definite or ascertainable sum such as would give rise to a contractual right, implied or otherwise. *Barker v. Lein*, *supra*, 366 F.2d 757; *Saracena v. United States*, *supra*, 508 F.2d 1333; *Schein v. United States*, *supra*, 352 F. Supp. 182; *Divonne v. Internal Revenue Service*, *supra*, 75-2 USTC ¶ 9619. Moreover, the Treasury Regulations specifically provide that "no person is authorized under these regulations to make any offer, or promise, or otherwise bind a district director with respect to the payment of any reward or the amount thereof." 26 C.F.R. § 301.7623-1(c). See *Federal Crop Insurance Co. v. Merrill*, 332 U.S. 380, 384-85 (1947).

Accordingly, as the District Court correctly found, appellant has not alleged the substance of a cause of action.

CONCLUSION

The decision of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
22nd day of October, 19 76 she served ^{two} ~~a~~ copies of the
within Appellee's Brief

by placing the same in a properly postpaid franked envelope
addressed:

Sol Freedman
79 Wall Street
New York, New York 10005

And deponent further
says s he sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse Annex,
One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marian J. Bryant

22nd day of October, 19 76

Pauline P. Troia
PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978